SYNOPTICAL OUTLINE

Page

I. Relief now asked on ground not claimed in original petition 2

II. Federal question not seasonably raised..... 2

III. Analysis of petitioner's argument..... 3

The petitioner claims violations of

(1) the Fourteenth Amendment;

(2) the Seventh Amendment; and

(3) the Northwest Territory Ordinance of 1787.

IV. The Fourteenth Amendment does not control the right to a trial by jury in a state court..... 4

V. The Seventh Amendment has no application to state court action 5

VI. Nothing in the Northwest Territory Ordinance of 1787 affects the right to a trial by jury in an action at law in Wisconsin..... 7

VII. Petitioner's concession that the court had the power to determine whether the article was capable of a defamatory meaning is conclusive against him 7

Once the court determined that question in favor of the defendants, no question remained for the jury.

VIII. Review of petitioner's argument..... 8

IX. A proper case for a penalty.....11

TABLE OF CASES

Page

Abbott v. Tacoma Bank of Commerce, 175 U. S. 409..... 5

Ches. & Ohio Ry. v. Carnahan, 241 U. S. 241..... 6

Chicago, Burlington, etc. R'd, 166 U. S. 226..... 6

Cincinnati v. Louisville & N. R. Co., 223 U. S. 390..... 7

Escanaba Company v. Chicago, 107 U. S. 678..... 7

Frank v. Mangum, 237 U. S. 309.....4, 5

Hawkins v. Bleakly, 243 U. S. 210.....4, 4

Iowa Central Railway Company v. Iowa, 160 U. S. 389..4, 4

Minn. & St. Louis R. R. v. Bombolis, 241 U. S. 211..... 5

New York Central R. R. Co. v. White, 243 U. S. 188....4, 4

Pearson v. Yewdall, 95 U. S. 294.....5, 6

Sands v. Manistee River Improv. Co., 123 U. S. 288.... 7

Wagner Electric Manufacturing Company v. Lyndon, et al., 262 U. S. 226.....12

Walker v. Sauvinet, 92 U. S. 90.....4, 9

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1..... 7

In the

Supreme Court of the United States

October Term, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT and LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONDENTS' BRIEF OPPOSING REHEARING ON PETITION FOR WRIT OF CERTIORARI

On October 1, 1941, the petitioner presented a petition for a writ of certiorari to the Supreme Court of the State of Wisconsin to review a judgment of that court entered on May 20, 1941, and on which a rehearing was denied on July 7, 1941, affirming a judgment for the defendants in an action for libel entered in the Circuit Court for Milwaukee County, Wisconsin, on October 11, 1940, after the trial court had

changed the answers to two questions in a special verdict and ordered judgment notwithstanding the verdict.

The petition was denied on November 10, 1941, and the petitioner now seeks a rehearing.

I.

RELIEF NOW ASKED ON GROUND NOT CLAIMED IN ORIGINAL PETITION

The present petition is based on the claim of a denial of due process of law in violation of the Fourteenth Amendment (Pet. for Rehearing, p. 3).

Counsel say that they confine themselves "to the issues of 'due process of law' and the right of 'trial by jury.'" (Brf. on Rehearing, p. 9.)

No such claim was made in the original petition. Nor was it made in the supporting brief.

That petition was limited to the claim of a denial of equal protection of the law. That claim is not now made. It must be deemed abandoned.

The denial now asserted is a denial of a trial by jury (Pet. for Rehearing, p. 7).

II.

FEDERAL QUESTION NOT SEASONABLY RAISED

This question could have been raised at any of the following stages:

(1) in opposing the defendants' motions for a directed verdict (R. 145, C. 144; R. 447, Supp. C. 273);

(2) in opposing the defendants' alternative motions after the return of the verdict to change answers and

for judgment notwithstanding the verdict (R. 46-50, C. 45-49);

(3) on the order to show cause why the decision of the trial court as first announced should not be modified before the entry of a formal order (R. 55-64, C. 54-63);

(4) on the assignment of error required to be incorporated into the appellant's brief on the original presentation in the State Supreme Court; and

(5) on the petition in this court for a writ of certiorari.

At no one of these stages was the question raised. There was a failure (1) at three stages in the trial court, (2) at the initial stage in the State Supreme Court, and (3) at the initial stage in this Court.

All of this was fully covered in our brief opposing the granting of a writ of certiorari. It was not met in the petitioner's reply brief. It is not met now.

III.

ANALYSIS OF PETITIONER'S ARGUMENT

The petitioner argues eight points. On analysis, these eight points resolve themselves into three propositions:

(1) that under the Fourteenth Amendment, every party to an action at law is entitled to a trial by jury;

(2) that a state court may re-examine a fact passed upon by a jury only in the manner to which federal courts are restricted under the Seventh Amendment; and

(3) that in Wisconsin, the rights of a party to an action at law in respect to a trial by jury are fixed by the Northwest Territory Ordinance of 1787.

IV.

THE FOURTEENTH AMENDMENT DOES NOT CONTROL THE RIGHT TO A TRIAL BY JURY IN A STATE COURT

The Fourteenth Amendment neither guarantees any particular form or method of state court procedure, nor implies that all trials must be by jury. Consistently with the due process clause, trial by jury may be abolished. It is not essential to due process, either in civil or criminal cases.

Walker v. Sauvinet, 92 U. S. 90 (1876);

Iowa Central Railway Company v. Iowa, 160 U. S. 389, at 393 (1896);

Frank v. Mangum, 237 U. S. 309, at 340 (1915);

New York Central R. R. Co. v. White, 243 U. S. 188, at 208 (1917);

Hawkins v. Bleakly, 243 U. S. 210, at 216 (1917).

In *New York Central R. R. Co. v. White*, 243 U. S. 188, at 208, the Court said:

> [243 U. S. 208] " * * * The denial of a trial by jury is not inconsistent with 'due process.' "

In *Hawkins v. Bleakly*, 243 U. S. 210, at 216, the Court said:

> [243 U. S. 216] "Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the Fourteenth Amendment."

In *Iowa Central Railway Company v. Iowa*, 160 U. S. 389, at 394, the Court said:

> [160 U. S. 394] "It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to construe the laws of the State as justifying the refusal. *Brooks v. Missouri*, 124 U. S. 394; *Spies v. Illinois*, 123 U. S. 131, 166."

In Frank v. Mangum, 237 U. S. 309, at 340, the Court said:

> [237 U. S. 340] "* * * But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Indictment by grand jury is not essential to due process (*Hurtado v. California,* 110 U. S. 516, 532, 538; *Lem Woon v. Oregon,* 229 U. S. 586, 589, and cases cited). Trial by jury is not essential to it, either in civil cases (*Walker v. Sauvinet,* 92 U. S. 90), or in criminal (*Hallinger v. Davis,* 146 U. S. 314, 324; *Maxwell v. Dow,* 176 U. S. 581, 594, 602, 604)."

In our brief opposing the grant of a writ of certiorari, we stated, on the authority of *Abbott v. Tacoma Bank of Commerce,* 175 U. S. 409, at pages 413 and 414, that there could be no claim of a deprivation of property without due process of law, since an action of this character involves no property (Respondents' Brf., p. 6).

In the petitioner's reply brief, it was asserted that that case was distinguishable from the case at bar; but there was no attempt to point out a distinction (Reply Brf., p. 5).

The brief in support of the motion for rehearing contains no reference to that decision.

V.

THE SEVENTH AMENDMENT HAS NO APPLICATION TO STATE COURT ACTION

This Amendment applies only to courts sitting under the authority of the United States.

Pearson v. Yewdall, 95 U. S. 294, at 296 (1877);

Minn. & St. Louis R. R. v. Bombolis, 241 U. S. 211, at 217 (1916);

Ches. & Ohio Ry. v. Carnahan, 241 U. S. 241, at 242 (1916).

In *Pearson v. Yewdall,* 95 U. S. 294, the Court said:

> [95 U. S. 296] "* * * We have held over and over again that art. 7 of the amendments to the Constitution of the United States relating to trials by jury applies only to the courts of the United States, *Edwards v. Elliott,* 21 Wall. 557; and in the act of the General Assembly of Pennsylvania, now under consideration, amply provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State. This is due process of law, within the meaning of that term as used in the Federal Constitution."

The petitioner argues that the last clause of the Seventh Amendment applies to cases tried before a jury in a state court. That amendment relates to the manner in which a *federal court* may re-examine a fact tried by a jury.

It has no relationship to the manner in which a *state court* may so re-examine a fact. The federal courts are restricted to a course "according to the rules of the common law." The state courts are not so restricted.

The petitioner's error is apparent from his citation of *Chicago, Burlington, etc. R'd,* 166 U. S. 226. The court there was considering the restrictions imposed on the actions of a *federal court,* which are precisely the same whether the verdict under review was rendered in a state or in a federal court. No such restriction is imposed by the Seventh Amendment on the action of a state court.

At page 22 of his brief, petitioner quotes a portion of a paragraph in the decision last cited, commencing at page 242. In the balance of the paragraph, the Court in express terms points out the distinction between the examination of a jury

finding by the *courts of the United States* and the examination of such a finding by a *state court.*

VI.

NOTHING IN THE NORTHWEST TERRITORY ORDINANCE OF 1787 AFFECTS THE RIGHT TO A TRIAL BY JURY IN AN ACTION AT LAW IN WISCONSIN

The petitioner argues that the right to a jury trial must be determined under a compact contained in the Northwest Territory Ordinance of 1787.

The unsoundness of that argument has long been settled, and it cannot now be considered debatable.

The States formed out of the Northwest Territory entered the Union unrestricted by the terms of the Ordinance of 1787, except as adopted by State law.

Escanaba Company v. Chicago, 107 U. S. 678, at 688 (1882);

Sands v. Manistee River Improv. Co., 123 U. S. 288, at 296 (1887);

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, at 9 (1888);

Cincinnati v. Louisville & N. R. Co., 223 U. S. 390, at 400 (1912).

VII.

PETITIONER'S CONCESSION THAT THE COURT HAD THE POWER TO DETERMINE WHETHER THE ARTICLE WAS CAPABLE OF A DEFAMATORY MEANING IS CONCLUSIVE AGAINST HIM

The Supreme Court of Wisconsin held that the proceedings following the return of the verdict were in accordance with the law of Wisconsin. In his original brief, petitioner argued that he was denied equal protection of the law be-

cause of a refusal to follow established Wisconsin practice. In his present brief, he abandons the claim of discrimination.

In his petition for rehearing, he expressly concedes the correctness of the statement that:

> "The court determines whether a communication is capable of a defamatory meaning while it is the function of the jury to determine whether a communication capable of a defamatory meaning was so understood by its recipient. (Sec. 614, Restatement of Defamation.)" (Pet. for Rehearing, p. 6.)

This, we submit, is conclusive against the petitioner. If the court determines that the language complained of is not capable of a defamatory meaning, there is nothing to go to the jury, and, under Wisconsin practice, it is for the court to make that determination at any time up to the entry of judgment.

Petitioner was not denied a trial by jury; he was permitted to adduce his evidence and examine all of the witnesses before a jury in the trial court. The action of the trial court was merely to rule that the evidence adduced was insufficient to support the jury's verdict which was that court's duty under the state law. (Respondents' Brf., pp. 11-18.)

VIII.

REVIEW OF ARGUMENT

The points argued in the brief in support of the petition for a rehearing will be reviewed in the order made.

POINT I, pages 10 and 11.

The petitioner argues that the right of trial by jury in actions at law is one of paramount importance and value. We have no quarrel with that, but it is not a matter in

respect to which the federal government has any supervision over the state governments. The three cases cited all relate to federal court action.

POINT II, pages 11 to 19.

Petitioner argues that he has been deprived of property without due process of law by a denial to him by the state courts of a trial by jury in violation of the Fourteenth Amendment.

This is answered in section IV, page 4, *supra.*

POINT III, pages 19 to 21

The petitioner argues that the right to a jury trial must be determined under a compact contained in the Northwest Territory Ordinance of 1787.

This is answered in section VI, page 7, *supra.*

POINT IV, page 21.

It is argued that the decision of the Wisconsin Supreme Court is in conflict with decisions of this court and of other state courts on the proposition that the denial of a trial by jury is not a denial of due process of law.

To quote from *Walker v. Sauvinet,* 92 U. S. 90, at 93 (Petitioner's Brief, p. 14):

> [92 U. S. 93] "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

For the right to a jury trial, and for the respective functions of the court and the jury in a jury trial in a state court, we look to the laws of the state, whether embodied in the Constitution, the Statutes, or the evolution of the common law through state court decisions. The most casual reading of the decision of the Wisconsin Supreme Court in this case indicates that throughout this litigation, all of the proceedings followed the course of the established law of the

state. That was due process of law. The plaintiff had his day in court and was treated precisely as is any other litigant in any jury case, whether the nature of the action be libel or anything else.

POINT V, pages 22 and 23.

The petitioner argues that the last clause of the Seventh Amendment to the Federal Constitution applies to cases tried before a jury in a state court equally with those tried before a jury in a federal court.

This is answered in section V, page 5, *supra.*

POINT VI, page 24.

The petitioner argues that the courts of Wisconsin proceeded erroneously, precisely as if this case were not an action at law but a suit in equity. He is charging simple error, and not a violation of a constitution inhibition.

POINT VII, page 25.

The petitioner argues that if there is any credible evidence to sustain a finding of fact made by a jury in an action at law, the verdict of the jury must be permitted to stand.

The rule in this matter for state courts must be determined by the law of the state. The state is not bound to follow the decisions of this court in a matter of this kind. Even if there were error, that would not give this court any jurisdiction.

POINT VIII, pages 26 to 28.

The petitioner argues that he has not had a trial by jury. If the argument were sound, this court could be called upon to review for mere error every judgment of any state court in which the court directed a verdict, set aside a verdict, or rendered judgment notwithstanding the verdict.

The petitioner concedes the correctness of the rule of the Supreme Court of Wisconsin that the trial court must deter-

mine whether a communication is capable of a defamatory meaning (Petitioner's Brf., p. 6).

The jury, after finding a charge of crime, also found that the language complained of would naturally have been understood to charge him "with [such] neglect in the performance of his duty as mayor of the city to preserve the public peace and good order of the city, as to charge him with moral responsibility for the bombings."

[We have inserted in brackets the word "such." Through an error, it was omitted in the printed case. This is one of the matters that would call for correction if a writ were granted.]

The gist of the finding is that there was a charge of neglect of official duty. That placed it definitely in the field of comment, and placed the same stamp on the remaining answers; and the trial judge, acting strictly in accordance with the long established law of Wisconsin, entered judgment notwithstanding the verdict. This subject was fully covered in Respondents' Brief opposing the grant of the writ of certiorari at pages 11 to 18.

IX.

A PROPER CASE FOR A PENALTY

Whether a federal question is presented calls for concentration on an extremely narrow field. The duty clearly to point out the federal question rests on the petitioner. It is not fair to the Court or opposing counsel to compel them to work through a maze of unrelated matter, to search for what may be debatable, then to set up the hypothesis upon which an argument must be made, if at all, and then to demonstrate the fallacy of that argument.

The record in the State Supreme Court consisted of over 1,200 typewritten pages. The record here consists of 518 printed pages.

Neither the petition for a writ of certiorari, nor the supporting brief complied with the rules of this Court; and we were compelled to restate the matter in our brief opposing the granting of the writ. The defect is not supplied either in the present petition or in the supporting brief.

We have read and reread paragraph I of the petition for a rehearing (pp. 2 and 3). We respectfully submit that it has no place in this record.

It is clear that there is no violation of the Fourteenth Amendment. The petitioner made grave and serious charges both in his petition for review and in his supporting brief, asserting that he had been denied equal protection of the law through an arbitrary departure by the Wisconsin courts from the established and still existing law of Wisconsin (Respondents' Brf., p. 40). No considerations other than an orderly application of the state law motivated the Wisconsin courts. Petitioner withdrew his charges in his Reply Brief (Petitioner's Reply Brf., p. 3). The petition presents no meritorious or even debatable matter.

Under the circumstances we respectfully submit that this is a proper case for the imposition of a penalty against the petitioner. This was done in *Wagner Electric Manufacturing Company v. Lyndon, et al.*, 262 U. S. 226.

Respectfully submitted,

J. GILBERT HARDGROVE,
ROBERT P. HARLAND,
Counsel for Respondents.

MILLER, MACK & FAIRCHILD
Of Counsel.